



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Winnebago County Department of Human Services, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 167673

Pursuant to petition filed August 3, 2015, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Winnebago County Department of Human Services to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a telephonic hearing was held on Tuesday, September 15, 2015 at 10:00 AM.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

PARTIES IN INTEREST:

Petitioner:

Winnebago County Department of Human Services
220 Washington Ave.
PO Box 2187
Oshkosh, WI 54903-2187
By: Jeanie Ortiz, Fair Hearing Coordinator

Respondent:

██████████
██████████████████
██████████████████████████████

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Winnebago County who received FS benefits in Winnebago County from at least January 1, 2014 through March 31, 2015.
2. On November 11, 2013 respondent applied for FS. On that same date he had an interview for FS. He was thereafter added to his girlfriend's (now wife) FS case. He did not report that his wife was employed.
3. Respondent's wife was employed from at least October 2013-March 2014.
4. On August 7, 2015, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent did not report earned income in the home.
5. The respondent failed to appear for the scheduled September 15, 2015 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory

to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

Respondent did not appear at the hearing; hence the agency’s evidence was uncontradicted. The agency argued that respondent had never reported his wife’s income and pointed out the discrepancies between the wages verified by respondent’s wife’s employer and the information that respondent submitted to the agency. As her income level was used to determine the amount of their monthly FS allotment, it is clear that respondent received a benefit from underreporting her income.

In order to conclude that an IPV has been committed, I am required to reach a firm conviction, based on clear evidence, that respondent committed a program violation and that he intended to do so. The information presented in the application and the case notes from the interview indicate that respondent never reported his wife’s income. There is no evidence that he ever reported the increased income thereafter either. Misstating facts with the intention of receiving or continuing to receive FS benefits and failing to report changes in income are violations of the FS program under Wis. Stat. §§49.795(2) and (2m). Both have occurred here and there is no doubt that a violation of the FS program has occurred.

That respondent intended to commit an IPV is also clear. Respondent had the opportunity to report the wife’s income on the application or during the interview. He did not. Nor is there evidence to show that he did anything to correct this information with the agency thereafter. Rather, he signed off on the application agreeing that what he submitted to the agency was correct and that he understood that giving incorrect information could result in a

fine or imprisonment. The respondent has not responded to the allegations by way of this hearing or in response to the letters the agency mailed to him to discuss the matter prior to hearing. I will further take his lack of response and appearance as an admission of the allegations and find that the agency has met its burden of proof with the evidence it has presented that the intentional program violation occurred.

Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the respondent. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FS program rule specifying that an intentional program violation of the FoodShare program occurs when a recipient intentionally makes a false or misleading statement, or misrepresents, conceals or withholds facts.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

NOW, THEREFORE, it is

ORDERED

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 7th day of October, 2015

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals

c: East Central IM Partnership - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Jeanie Ortiz - email



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The preceding decision was sent to the following parties on October 7, 2015.

Winnebago County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
JOrtiz@co.winnebago.wi.us